

Application No. 09/944,450
Amendment "B"
Reply to Office Action mailed April 6, 2005

REMARKS

These remarks and the accompanying amendments are responsive to the Office Action mailed April 6, 2005, having a shortened statutory period for response that expired on July 6, 2005. A petition and fee for a one-month extension of time extending the period for response until August 6, 2005 accompanies this response. Claims 1-104 were pending at the time of the last examination. For reasons that will be provided hereinafter, all rejections should be withdrawn for reasons that are independent of the scope of the claims. Nevertheless, for purposes of clarity, some of the claims are currently amended.

Challenge of Aihara as a valid 35 U.S.C. 102(e) reference.

The question of the whether or not Aihara is a valid 35 U.S.C. 102(e) reference for application the present patent application is an extraordinarily complex issue, and requires an in depth view of all of the relevant dates, as well as a detailed analysis on which version of 35 U.S.C. 102(c) to apply (pre-AIPA or post-AIPA).

The relevant dates for the present application are as follows: Foreign Priority Date: September 4, 2000; U.S. Application Date: August 31, 2001. The critical date to evaluate the date of invention against is the invention date. While the invention date may be presumed to be at latest the date of the United States filing, a foreign priority patent application may be used to presume an earlier invention date (see *In re Hilmer* 359 F.2d 859 and MPEP 2136.03 section 1). In this case, the United States patent application is fully supported by the Japanese patent application serial number 2000-267209, filed September 4, 2000, which claim for priority is acknowledged in section 1 of the Office Action. Accordingly, the date of invention for the present invention may be presumed to be at latest, September 4, 2000, which is the critical date for evaluating any references under 35 U.S.C. 102(c).

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Next, we must evaluate the relevant dates of the reference alleged to qualify as prior art under 35 U.S.C. 102(e). In this case, Aihara has the following relevant dates:

Priority date: European (foreign) patent application filed June 13, 2000.

PCT (international) application filed: June 13, 2001

U.S. patent application filed: February 7, 2002

Publication date: September 2, 2002.

Our first task is to determine which version of 35 U.S.C. 102(e) is to apply (i.e., pre-AIPA versus post-AIPA). MPEP 2136 indicates that:

The revised statutory provisions (*i.e., the post-AIPA 102(e) law*) supersede all previous versions of 35 U.S.C. 102(c) and 374, with only one exception, which is when the potential reference is based on an international patent application filed prior to November 29, 2000 . . . (MPEP 2136, first paragraph, lines 13-18, underlined material added by the undersigned for clarity).

In this case, the potential reference (i.e., Aihara) has an international filing date of June 13, 2001, which is after November 29, 2000, and thus the post-AIPA version of 35 U.S.C. 102(e) applies. Note that the Japanese filing date of Aihara of June 13, 2000 is not the international filing date, but just a foreign priority date that is not given credence as an international filing date (see MPEP 2136).

If post-AIPA 102(e) law is applied to Aihara, as the undersigned contends is appropriate due to the later international filing date of Aihara, then Aihara does not qualify as prior art under 35 U.S.C. 102(e). Specifically, the Aihara publication was filed in the United States on February 7, 2002, after the presumed invention date of September 4, 2000. Even if Aihara's PCT priority date of June 13, 2001 is applicable as a relevant 35 U.S.C. 102(e) date (e.g., in cases where the PCT application designates the United States at the time of filing, which has not been proven or

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alleged by the Examiner as yet), that date still does not predate the presumed invention date of September 4, 2000.

Even if pre-AIPA 102(c) law is applied, the case seems to get worse for using Aihara as a prior art reference. In particular, in addition to the above evaluation, the patent publication does not yet appear to be a patent, which appears to be a requirement under pre-AIPA 102(c) law. Accordingly, Aihara does not qualify as prior art under either pre-AIPA or post-AIPA law.

Accordingly, the undersigned respectfully submits that Aihara is not a valid prior art reference under 35 U.S.C. 102(c). Furthermore, for more obvious reasons, it should be clear that Aihara does not qualify as prior art under 35 U.S.C. 102(a) or 35 U.S.C. 102(b) either.

Challenge of Bouquier as a valid prior art reference.

Bouquier is a U.S. patent publication that has the following relevant dates:

European (foreign, not "international") patent application filed: March 3, 2000

U.S. patent application filed: March 2, 2001

Published: November 15, 2001.

Bouquier was published on November 15, 2001, which was after even the United States filing date of the present application. Accordingly, Bouquier cannot qualify as prior art under 35 U.S.C. 102(a) or 35 U.S.C. 102(b).

As for 35 U.S.C. 102(e), we must determine whether pre-AIPA or post-AIPA 102(c) applies. In this case, there is no international filing date for Bouquier. There is only a European application date, which is not relevant for evaluating 35 U.S.C. 102(e) (see once again MPEP 2136.03, section I). Therefore, post-AIPA 102(e) applies. Here, the U.S. filing date of Bouquier is March 2, 2001, which is after the presumed invention date of September 4, 2000 of the present application. Therefore, Bouquier does not qualify as prior art under 35 U.S.C. 102(e).

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Conclusion

Since all rejections rely on Aihara as a valid prior art reference, all rejections should be withdrawn. Furthermore, since Bouquier also is not a valid prior art reference, rejections based on Bouquier should be withdrawn for that additional reason as well.

In the event that the Examiner finds remaining impediment to a prompt allowance of this application that may be clarified through a telephone interview, the Examiner is requested to contact the undersigned attorney.

Dated this 10th day of August, 2005.

Respectfully submitted,



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